

111 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Investigation of Certain Enron-Affiliated QFs Docket Nos. EL03-47-003

Colstrip Energy Limited Partnership QF84-377-010

ORDER AFFIRMING INITIAL DECISION

(Issued April 8, 2005)

1. In this order, we affirm and adopt an Initial Decision¹ granting summary disposition. In the Initial Decision, the presiding administrative law judge summarily found that the small power production facility owned by Colstrip Energy Limited Partnership (Colstrip) has met and continues to meet the ownership criteria for qualifying facility (QF) status under the Public Utility Regulatory Policies Act of 1978 (PURPA).²

Background

2. On February 24, 2003, the Commission initiated an investigation into Enron Corporation (Enron) and its ownership of two cogeneration facilities in Docket No. EL03-47-000.³ In its February 24 Order, the Commission set for hearing the issue of whether those two cogeneration facilities satisfied the statutory and regulatory requirements for QF status. Our concern was whether Enron's ownership interests in the facilities affected the facilities' compliance with the ownership criteria for QF status.

3. On May 2, 2003, the Commission initiated an investigation into Enron and its ownership of three additional QFs following Enron's merger with Portland General Corporation (Portland General) in 1997. The May 2 Order consolidated the proceedings with the ongoing investigation initiated by the February 24 Order. In the May 2 Order,

¹ *Investigation of Certain Enron-Affiliated QFs*, 108 FERC ¶ 63,037 (2004).

² 16 U.S.C. § 824a-3(a) (2000).

³ *Investigation of Certain Enron-Affiliated QFs*, 102 FERC ¶ 61,199 (2003) (February 24 Order).

the Commission also directed Enron to file a list with the Commission of all QFs over which Enron, an Enron affiliate, or an Enron employee had any ownership interest or control following Enron's merger with Portland General.⁴

4. In compliance with the May 2 Order, Enron provided a list of thirteen additional QFs in which it held an ownership interest following Enron's merger with Portland General. Included in that list was Colstrip's small power production facility.

Statutory and Regulatory Background

5. PURPA was designed to lessen the country's dependence on foreign oil. Congress believed that increased use of non-utility energy resources would reduce the demand for traditional fossil fuels.⁵ In passing PURPA, Congress identified two major obstacles that had served in the past to stifle non-utility power plant development: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional utilities; and (2) the substantial burdens of pervasive federal and state regulation. Congress in PURPA sought to remove these obstacles.

6. As directed by Congress in section 210(a) of PURPA,⁶ the Commission prescribed regulations designed to encourage the development of cogeneration and small power production. As directed by Congress, the Commission's regulations required electric utilities to purchase electricity from and sell electricity to QFs. The Commission further required that electric utilities purchase electric energy from QFs and that they do so at "avoided cost" rates.⁷ The Commission also removed certain state and federal regulation that QFs would otherwise be subject to, by granting QFs exemptions from most such regulation.⁸

⁴ *Investigation of Certain Enron-Affiliated QFs*, 103 FERC ¶ 61,122 (2003) (May 2 Order).

⁵ See *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982) (citing legislative history of PURPA).

⁶ 16 U.S.C. § 824a-3(a) (2000).

⁷ 18 C.F.R. §§ 292.303-292.304 (2004).

⁸ 18 C.F.R. §§ 292.601-292.602 (2004).

7. In Subpart B of the Commission's PURPA regulations, the Commission set forth criteria and procedures for QF status.⁹ One of the criteria for QF status relates to ownership of the QF. Sections 3(17)(C)(ii) and (18)(B)(ii) of the Federal Power Act (FPA)¹⁰ provide that a QF must be:

owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

The Commission's regulation implementing this statutory requirement states that:

(a) General Rule. A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) Ownership test. For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest in a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.^[11]

8. The Commission has summarized its ownership requirements for QF status thus:

The Commission's regulation thus equates "ownership interest" with "equity interest," but does not define the term "equity interest." This definitional issue has been most problematic in cases involving partnerships as opposed to corporations. This is because the stated percentage of partnership interests in partnership agreements does not always correspond with specific provisions in the partnership agreements concerning control of and/or division of benefits from the partnership assets. The Commission has therefore looked to the entitlement to profits, losses, and surplus after

⁹ 18 C.F.R. §§ 292.201-292.211 (2004).

¹⁰ 16 U.S.C. §§ 796(17)(C)(ii) and (18)(B)(ii) (2000).

¹¹ 18 C.F.R. §§ 292.206 (a) and (b) (2004).

return of initial capital contribution, as well as the share of control of the venture, to help it in determining whether the division of equity interests in a partnership complies with the statutory and regulatory ownership requirements for QF status. [¹²]

9. Though no fixed rules have been established to define equity interest in evaluating partnership equity interests, the decisive factors have been the "stream of benefits" and control of the venture.¹³ The stream of benefits has been defined as the distribution of profits, losses and surplus from a venture.¹⁴ In elaborating on the application of this test, the Commission has explained that "[i]t is the investment in and the realization of gain from the venture and not merely the exercise of control that determines the equity interest."¹⁵

Factual Background

10. Colstrip's facility is a 42 MW small power production facility located near Colstrip, Montana. It was originally certified as a qualifying cogeneration facility on December 11, 1984.¹⁶ On October 9, 1987, it was certified as a qualifying small power production facility.¹⁷ The facility has been recertified on several occasions, with the most recent being on March 18, 1998.¹⁸ The history of Colstrip's ownership is described fully in the Initial Decision.¹⁹ Colstrip sells all the capacity and energy from its facility to NorthWestern Corporation (NOR) pursuant to a long-term power sales agreement. Relevant to the instant case is a provision in the Colstrip Limited Partnership Agreement for an Incentive Operating Performance Distribution (IOPD) payment to the general partner, Rosebud Energy Corporation (Rosebud).

¹² *Indeck North American Power Fund, L.P.*, 85 FERC ¶ 61,239 at 62,001-02 (1998) (footnote omitted), *order noting withdrawal of reh'g and denying motion to vacate*, 86 FERC ¶ 61,123 (1999).

¹³ *Ultrapower 3*, 27 FERC 61,094 (1984).

¹⁴ *Id.*

¹⁵ *KP Diversified Investors, Inc.*, 32 FERC ¶ 61,013 (1985); *see also Cogeneration National Corporation*, 32 FERC ¶ 61,012 (1985); *CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987).

¹⁶ *AEM Corp.*, 29 FERC ¶ 62,254 (1984).

¹⁷ *AEM Corp.*, 41 FERC ¶ 62,031 (1987).

¹⁸ *Colstrip Energy Ltd. Partnership*, 82 FERC ¶ 62,195 (1998).

¹⁹ 108 FERC ¶ 63,037 at P 4-5.

Initial Decision

11. The judge found that he could decide this case on summary disposition because there was no material issue of fact in dispute. At issue is whether Colstrip's facility has failed at any time or currently fails to meet the Commission's ownership requirement for QF status. Colstrip, Enron, Enron North America Corporation (ENA), and Commission Trial Staff (Trial Staff) (collectively, Joint Movants) moved for summary disposition. Joint Movants claim the facts demonstrate that Enron's acquisition of ownership interests in the Colstrip facility does not result in electric utilities receiving more than 50 percent of the stream of benefits over the life of the facility. In a separate and opposing motion, NOR also moved for summary disposition, claiming that the Colstrip facility fails to meet the Commission's ownership requirement for QF status.

12. The judge identified the salient issue in the proceeding as the characterization of the IOPD payment to the non-utility general partner, Rosebud. Citing Commission precedent,²⁰ the judge stated that, if the IOPD payment to Rosebud constitutes an entitlement to profits or a surplus after return of initial capital contributions, then the payment to Rosebud is properly treated as an equity interest and part of the stream of benefits. If the IOPD payment to Rosebud is an arms-length-service-related cost or bonus, or a loan-related cost, then the payment to Rosebud is properly excluded from the stream of benefits.²¹

13. Joint Movants argued that the IOPD payment to Rosebud is a profit distribution, and therefore should be included in the stream of benefits – and so the share of the cash distributions to the electric utilities never exceeded 50 percent. On the other hand, NOR contended that the IOPD payment to Rosebud is a bonus, and therefore should be excluded from the stream of benefits – the net effect of which is to make the share of the cash distributions to the electric utilities exceed the Commission's threshold of 50 percent in certain calendar quarters. Joint Movants also stipulated, however, that when viewed over the life of the facility no electric utility will receive more than 50 percent of the stream of benefits, even if the IOPD payment is excluded.

²⁰ *Ultrapower 3*, 27 FERC ¶ 61,094 at 61,183-84 (1984); *Chambers Cogeneration Ltd. Partnership*, 57 FERC ¶ 62,187 at 63,399 (1991).

²¹ We note that because Rosebud is a non-utility general partner, the effect of including the IOPD payment in the stream of benefits is to increase the percentage of the stream of benefits received by the non-utility partners and to decrease the percentage received by the electric utilities.

14. The judge found Joint Movants' position more persuasive. The judge found that the IOPD payment is a distribution of excess profits which is not tied to a specific service provided by Rosebud.²² Therefore, the IOPD payment is properly included in the stream of benefits calculation. Given this finding, the judge found that the cash distribution analysis indicates that electric utilities never received greater than 50 percent of the cash distributions from the Colstrip facility. Thus, the judge granted Joint Movants' motion for summary disposition and confirmed the QF status of the Colstrip facility. The judge also denied NOR's motion for summary disposition.

Exceptions to the Initial Decision

15. On exceptions to the Initial Decision, NOR argues that: (1) the IOPD payment should be excluded from the stream of benefits calculation; (2) electric utilities thus received more than 50 percent of the stream of benefits; and (3) Enron's ownership interest in the Colstrip facility, as a result, causes the facility to lose its QF status.

16. Briefs opposing Exceptions were filed by Trial Staff, jointly by Enron and ENA, and by Colstrip.

Discussion

17. The Commission finds, having reviewed the Initial Decision, the record, and the parties' briefs, that all of the issues raised by the parties were properly resolved by the Initial Decision. As the judge correctly determined, the IOPD payment represents a distribution of profits, and is therefore properly included in the calculation of the stream of benefits. Hence, electric utilities never received more than 50 percent of the stream of benefits and Colstrip's facility continued to meet the Commission's ownership requirements for QF status. Furthermore, Enron's ownership interest in the Colstrip facility did not cause it to lose its QF status. We therefore deny the exceptions and summarily affirm and adopt the Initial Decision as our own decision.

²² The judge found that, pursuant to the terms of the Colstrip Limited Partnership Agreement, the IOPD payment is made to Rosebud when the partnership has excess cash. Excess cash is defined as the amount by which net operating revenues for any calendar quarter exceed the sum of professional fees, the base management fee, and the operating savings threshold.

The Commission orders:

The Initial Decision in these proceedings is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.